IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1973

No. 72-493

JOHN W. VLANDIS, Director of Admissions,
The University of Connecticut,

Appellant,

v.

MARGARET MARSH KLINE and
PATRICIA CATAPANO,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF CONNECTICUT

APPELLEES' BRIEF

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QUESTION PRESENTED

Whether the State of Connecticut may permanently deny resident student status to one of its bona fide residents under a system of tuition classification at its institutions of higher learning which imposes a permanent irrebuttable presumption of non-residency based wholly on recent travel.

STATEMENT OF THE CASE

The appellee, Margaret Marsh Kline, was found by the lower Court to be a bona fide resident of the State of Connecticut (App.Jurisdictional Statement 5-6a).* She is an undergraduate student at the University of Connecticut. By state statute she is permanently classified as an out-of-state student. (App.Jur. 3a). The situation of the appellee, Patricia Catapano, is in all respects similar except that she is a graduate student at the University of Connecticut. Both are over twenty-one years of age. Both appellees are proceeding *in forma pauperis*.[1] (R. 12). As a consequence, each was required to pay twice the in-state tuition plus and additional $400.00 annual out-of-state "fee." (App.Jur. 3a).

In May of 1971, Mrs. Kline, while attending college in California as an in-state student, became engaged to Peter Kline, a life-long Connecticut resident. (App.Jur. 2a). Because the Klines wished to reside in Connecticut after their marriage, Mrs. Kline applied to the University of Connecticut from California and was accepted in late May, 1971. (A. 21a). At that time, she was informed by

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*Hereinafter cited (App.Jur.).

[1] The appellees' application for a temporary injunction against enforcement of the statute and the regulations thereunder setting up the fee differentials was denied after the court was advised that student loans or grants sufficient to meet the added charges for the Spring semester had been made available to them. See Ruling on Application for a Preliminary Injunction, January 4, 1972. (R. 13)

the University that she would be considered an in-state student at the University of Connecticut. (A. 21a).

In June, 1971, the appellee and Peter Kline intermarried in California and soon after took up residence in Storrs, Connecticut, where they have established a permanent home. (App.Jur. 2a). Mrs. Kline has a Connecticut driver's license, her car is registered in Connecticut, and she is registered as a Connecticut voter. (App.Jur. 2a). The Court below found that ". . . before the commencement of the Spring semester in 1972 [Mrs. Kline] was a bona fide resident of the State of Connecticut." (App.Jur. 5a).

In July of 1971, the tuition statute in question (Connecticut General Statutes, Section 10-329(b)) went into effect which defined a married out-of-state student as one "whose legal address at the time of his application for admission to such a unit [of higher education] was outside of Connecticut."[2] (A. 11a). Accordingly, the appellant, Director of Admissions of the University of Connecticut, irreversibly classified Mrs. Kline as an out-of-state student. (App.Jur. 3a). Mrs. Kline protested and the appellant replied that under the statute, "It becomes quite obvious that you fall into the category of an out-of-state student." (A. 6a).

As a consequence, Mrs. Kline was required to pay $150.00 out-of-state tuition for the first semester and a $200.00 non-resident fee, as compared with no tuition being paid by a student classified as a Connecticut resident. In addition, she was required to pay $200.00 per semester as a "non-resident fee." Upon registration

[2]Involved here also are "regulations of the University which have followed the relevant portions of the statute *in haec verba*." *Kline v. Vlandis*, 346 F. Supp. 526, 527 n.1 (A. 7a).

for the second semester, she was required to pay $425.00 tuition plus another $200.00 non-resident fee while a student classified as a Connecticut resident paid $175.00 tuition. Had Mrs. Kline applied from Connecticut rather than California, she would have been considered a Connecticut resident.

The second appellee, Patricia Catapano, moved her residence to Connecticut from Ohio in August, 1971. She has a Connecticut driver's license, her car is registered in Connecticut, and she is registered as a Connecticut voter. She is an unmarried graduate student at the same University. The Court found that ". . . before the Spring semester in 1972 [Miss Catapano] was a bona fide resident of the State of Connecticut." (App.Jur. 2a, 5-6a).

The appellant irreversibly classified her as an out-of-state student pursuant to subsection (a)(2) of Section 10-329(b) of the Connecticut General Statutes which defines a single out-of-state student as one "whose legal address for any part of the one year period immediately prior to his application . . . was outside of Connecticut." (A. 11a).

As a consequence, Miss Catapano was required to pay $150.00 tuition and a $200.00 non-resident fee for the first semester and $425.00 tuition plus an additional $200.00 non-resident fee for the second semester. (App. Jur. 3a).

Once the appellees were so classified their status was irreversible since the statute commands that:

> The status of a student as established at the time of his application for admission at a constituent unit of the state system of higher education under the provisions of this section shall be his status for the

entire period of his attendance at such constituent unit. (A. 11a).

The appellant's Brief on the Merits fall considerably short of reflecting all the pertinent facts with respect to the appellees' voter registration. The appellant states that neither appellee was registered to vote at the time of trial on January 7, 1972. (Appellant's Brief on the Merits, at 4). This is literally true. But, he fails to state that both appellees became registered voters in the Town of Mansfield on the afternoon of January 7, having completed their six month residency requirement, Connecticut General Statutes, Section 9-12.[3] This fact was brought to the trial court's attention in plaintiffs' brief dated January 20, 1972, and adopted by the court in its opinion as a finding of fact which it issued on June 14, 1972.

A Three-Judge District Court was convened on November 10, 1971, and oral argument was heard on January 7, 1972. On June 14, 1972,[4] six months later, the District Court filed its Memorandum of Decision unanimously holding that the Connecticut out-of-state tuition law violated the Fourteenth Amendment to the United States Constitution and entered its Order and Judgment declaring the classification provision of the statute unconstitutional and enjoining the defendant from enforcing

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[3]Since held unconstitutional in *Nicholls v. Schaffer*, 344 F. Supp. 238 (D. Conn., 1972).

[4]This six month delay was partially explained by the District Court as follows: "Shortly after this case was heard, defense counsel informed the Court that the legislature, then in session, was considering a bill relating to tuition payments by non-residents which would repeal the particular portions of the statute which are the target of constitutional attack here. Although such a bill was passed [House No. 5302], . . . the Governor of Connecticut vetoed it on May 10, 1972." (Opinion, n.3).

subsections (a)(2), (a)(3), and (a)(5) of Section 10-329(b) of the Connecticut General Statutes.

On July 11, 1972, the appellant moved that the District Court stay the permanent injunction pending appeal to the Supreme Court, which motion was denied. A similar motion addressed to Mr. Justice Marshall was denied by him on August 3, 1972.

In its opinion (n.4) the District Court noted that the statute in question was "... so arbitrary and unreasonable by its own terms as to be unconstitutional ..." (App.Jur. 5a, n.4) and stated:

> Assuming that it is permissible for the state to impose a heavier burden of tuition and fees on non-residents than on resident students, the state may not classify as 'out of state students' those who do not belong in that class. (App.Jur. 4a).

SUMMARY OF ARGUMENT

1. *Connecticut's Irrebuttable Presumption of Non-Residency Violates the Equal Protection Clause of the Fourteenth Amendment.*

   a. The statute must be judged by the compelling state interest test.

The compelling state interest test is required because the statute in question penalizes and deters the fundamental right to travel. The testimony of the appellees demonstrates the actual deterrent effect of the statute. Neither would have travelled to Connecticut to become residents and attend the University if they were aware of the permanent nature of the classification. The Court below found them to be bona fide residents of Connecticut, *Kline v. Vlandis*, 346 F. Supp. 526 (D.Conn.,

1972) even though both were classified as "out-of-state" residents by the University. Consequently, they were required to pay $800 more per year than other bona residents. This court has held in *Dunn v. Blumstein*, 405 U.S. 330 (1972) that a state cannot impose penalties on those who exercise their fundamental Constitutional rights to travel. Here the statute deters the right to travel, penalizes recent travel, and absolutely bars contravention of the out-of-state classification. Thus, the Connecticut statute impinges upon the fundamental right to travel and therefore requires that the compelling state interest test be used for strict equal protection review.

b. The State of Connecticut's objectives of partial cost equalization based upon past tax contributions and administrative certainty of a college student's domiciliary intent do not satisfy compelling state interests.

This Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969) made it clear that objectives based upon past tax contributions were constitutionally impermissible.

Connecticut here also argues that its second objective is to insure with administrative certainty the domiciliary intent of its college students. The state has a legitimate interest to protect itself from abuse of resident status for tuition purposes, but must do so in a way not to interfere with or penalize the constitutional right to travel. By the absolute classification the State of Connecticut has chosen a course of greater interference with the right to travel. The state not only can, but is now using less drastic means to accomplish its purpose. For these reasons the opinion of the District Court should be affirmed.

2. *Connecticut's Irrebuttable Presumption of Non-Residency Even Violates Traditional Equal Protection Standards.*

Where traditional review is applied, the Court must find some rational connection between the legitimate state policy objective and the means selected to achieve that objective. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Nevertheless, the rational connection test still requires the invalidation of Connecticut's permanent presumption of non-residency for tuition purposes. There is no rational basis for equalizing the cost of public higher education between residents and non-residents by permanently imposing non-resident's status on new bona fide residents. It is logically impossible for bona fide Connecticut residents who attend college in Connecticut to be out-of-state students. Nor is there a rational basis for determining bona fides of residence by imposing non-resident status on new arrivals because their college application was filed from a non-Connecticut residence. Rational criteria for determining bona fide residence not only exist, but are now in use by the State. There is no reason for Connecticut to exclude new residents from resident tuition status solely because they are recent arrivals. Such a purpose is constitutionally impermissible as a penalty on the right to free travel. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972). In short, Connecticut's permanent presumption of non-residency is designed to accomplish nothing with respect to equalizing the cost of public higher education or determining bona fide residence.

3. *The Statutory Classification of Appellees as Non-Resident Students Violates The Standards of Due Process Required by the Fourteenth Amendment.*

Connecticut utilizes a statutory irrebuttable presumption of non-residency for students who resided out-of-state at the time they applied to a state university. Appellees, who were both found to be bona fide residents of Connecticut by the lower court, were classified as permanent non-resident out-of-state students because of their non-residency at the time of application. Appellee Kline married a life-long Connecticut resident and moved to her husband's home state after her marriage.

The classification of Connecticut residents as non-resident out-of-state students deprives appellees of the three important interests, property, interstate travel and a state entitlement of education. The procedure utilized to grant or deny each of these important interests must meet the standards of due process required by the Fourteenth Amendment.

The out-of-state student classification subjected appellees to an additional tuition charge. The importance of property to the individual and the necessity for due process before its deprivation is a basic component required by the due process clause. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Heiner v. Donnan*, 285 U.S. 312 (1932); and *Coe v. Armous Fertilizer*, 237 U.S. 413 (1915).

The irrebuttable presumption of non-residency infringed on appellees' fundamental constitutional right to interstate travel. *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Dunn v. Blumstein*, 405 U.S. 330 (1972).

State provided education is at the very least, an important interest whose deprivation must be accompanied by due process. *Brown v. Board of Education*, 347 U.S. 483 (1954); *McCollum v. Board of Education*, 333 U.S. 203 (1948).

Without the initiation of this litigation, appellees would have been forced to terminate their education in Connecticut because of the irrebuttable presumption of non-residency. The granting or denying of a state provided entitlement such as education must be accompanied by due process. *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The utilization of an irrebuttable presumption of non-residency prevents a meaningful inquiry or a hearing into the fundamental element essential to the decision to grant or deny residential student status. A classification procedure which utilizes such an irrebuttable presumption violates the standard of due process required by the Fourteenth Amendment. *Heiner v. Donnan*, 285 U.S. 312 (1932); *Bell v. Burson*, 402 U.S. 535 (1971); and *Stanley v. Illinois*, 405 U.S. 645 (1972).

The irrebuttable presumption in Connecticut General Statutes, Section 10-329(b) violates the Fourteenth Amendment in denying the important interests of property, interstate travel, and a state provided entitlement without due process of law.

ARGUMENT

I.

CONNECTICUT'S PERMANENT, IRREBUTTABLE CLASSIFICATION OF A BONA FIDE CONNECTICUT RESIDENT AS A NON-RESIDENT FOR THE PURPOSE OF REQUIRING HIGHER TUITION PAYMENTS PENALIZES THE APPELLEES FOR EXERCISING THEIR FUNDAMENTAL CONSTITUTIONAL RIGHT TO TRAVEL IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

INTRODUCTION

At the outset, it is important to note what is not at issue in this case. The appellees here do not challenge the right of the State of Connecticut to restrict in-state tuition status to bona-fide Connecticut residents. Instead they challenge that statutory provision that will never allow them to qualify as bona fide residents. The court below specifically found that "before the commencement of the Spring Semester for 1972 each of the plaintiffs was a bona-fide resident of the State of Connecticut. . ."[5]

But, in addition to this, the Connecticut scheme required an additional residency period, depending upon whether the person was married or single, in order to be granted in-state tuition status.[6] It provided that Mrs.

[5] *Kline v. Vlandis*. 346 F. Supp. 526, 529 (D. Conn, 1972) (Three-Judge Court) (App., at 5a-6a).

[6] Section 10-329 (b) of the Connecticut General Statutes (as amended by Connecticut Public Acts (1971) No. 5 §126 (June Session) states that a married student shall be classified as "out-of-state" if his "legal address at the time of his application . . . was outside of Connecticut."

Kline must have been a resident of Connecticut *before she filed her application* for admission to the University of Connecticut[7] and Miss Catapano must have been a resident in the state for one year *before she filed her application*. It is this additional durational residence requirement which the appellees challenge. This point is undisputed. In his brief, the appellant states: "In this connection, it should be noted that an individual may *delay his studies* and establish in-state residency for a future application."[8] (emphasis added). That this is the *only way* to satisfy this requirement is also undisputed since the statute further commands that once a student's resident status is established, he is plainly and explicitly barred from obtaining any change in that status.[9] *See, Dunn v. Blumstein*, 405 U.S. 330 (1972).

With respect to single students, the statute provides that a student will be classified as out-of-state if his legal address:

> for any part of the one-year period immediately prior to his application . . . was outside of Connecticut. (App., at 11a).

[7]The duration for married students here being at least one semester—that period of time between application, acceptance and actual matriculation. Conn. Gen. Stat. 10-329 (b) (App., at 11a).

[8]Appellant's Brief on the Merits, at 5.

[9]"The status of a student, as established at the time of his application for admission at a constituent unit of the state system of higher education . . . shall be his status for the entire period of his attendance at such constituent unit." Conn. Gen. Stat. §10-329(b) (App., at 11a).

A. The Right To Travel Interstate Is a Fundamental Constitutional Right.

The right to travel has been established by this Court as a fundamental constitutional right. In the early *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), Chief Justice Taney said:

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States, as members of the same common unity must have the right to pass and repass through every part of it without interruption, as freely as in our own states.
> *Id.*, at 492 (Taney, C.J., dissenting).

In *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868), this Court struck down as unconstitutional the imposition of a $1.00 capitation tax on railroad or stage coach passengers as an abridgement on such persons' fundamental right to pass freely from state to state.[10]

Recently, in *United States v. Guest*, 383 U.S. 745 (1966), Mr. Justice Stewart emphasized that the source of the right in question need not be ascribed to any particular constitutional provision.

> [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any

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[10] *See also, Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 77 (1873); *Williams v. Fears*, 179 U.S. 270 (1900); *Edwards v. California*, 314 U.S. 160 (1941).

> event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.
> *Id.*, at 758 (citations omitted) (footnotes omitted).

Three years after *Guest*, the Court held in *Shapiro v. Thompson*, 394 U.S. 618 (1969), that absent a compelling state interest, a state may not impose a one-year durational residency requirement as a condition of receiving public welfare benefits which impinges upon the recipient's constitutional right to travel freely from state to state.[11]

Last Term this Court in *Dunn v. Blumstein*, 405 U.S. 330 (1972), held that Tennessee's durational residency requirement as a prerequisite for voter registration was unconstitutional. Mr. Justice Marshall, speaking for the majority, clearly enunciated two distinct fundamental constitutional rights—the right to vote and the right to travel. Both, he concluded, must be analyzed under the "strict scrutiny" test of the Equal Protection Clause of the Fourteenth Amendment.[12]

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[11] In his concurring opinion in Shapiro, *supra*, Mr. Justice Stewart emphasized the continuing evolution of the right to travel from deeply ingrained constitutional theory:

> This Constitutional right . . . is *not* a mere conditional liberty subject to regulations and control under conventional due process of Equal Protection standards. 394 U.S., at 642-43 (Stewart J., concurring) (citation omitted) (footnote omitted).

[12] The fact that the lower court in the case at bar chose not to base its decision upon the infringement of the appellees' constitutional right to travel is of no jurisdictional consequence. The prevailing party in the lower court may assert in the appellate court any ground to support his judgment regardless of the trial court's finding. *Compare, Langnes v. Green*, 282 U.S. 531, 538 (1931). *With Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 567-68 (1931). In the case at bar appellees do not attack

The underpinnings of the constitutional right to travel discussed in both *Shapiro* and *Dunn* are fully applicable to the instant case. The liberty to migrate, to live where one chooses, and, after establishing a bona-fide residence, to enjoy the same benefits as other bona-fide residents is most fundamental to our individual concepts of freedom. It having been established by this Court that "the right to travel is 'an *unconditional* personal right', whose exercise may not be conditioned," *Dunn, supra*, 405 U.S., at 341. (emphasis supplied); *Shapiro, supra*, 394 U.S., at 643 (Stewart J., concurring); *Oregon v. Mitchell*, 400 U.S. 112, 292 (1970) (opinion of Mr. Justice Stewart, in which Burger, C.J., and Blackmun, J., joined), any penalty or abridgment of the appellees' fundamental right to travel can be sustained only if the State of Connecticut can demonstrate a compelling state interest.

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in any respect the decree entered below. They "merely assert additional grounds why the decree should be affirmed." *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435-36 (1924). Since the constitutional right asserted herein was fully argued below, the consideration of the claim of an interference with the right to travel interstate is appropriate by this Court. *Bondholders Committee v. Commissioner*, 315 U.S. 189, 192 n.2 (1942); *Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970); *Wyman v. James*, 400 U.S. 309, 345 n. 7 (1971), (Marshall, J., dissenting); H. Hart & H. Wechsler, *The Federal Court and the Federal System*, 1394 (1953). *See also, Jaffke v. Dunham*, 352 U.S. 280 (1957).

B. Connecticut's Permanent Irrebuttable Classification of Bona-Fide Residents as Non-Residents for Tuition Purposes Penalizes and Deters the Appellees' Right To Travel and Therefore Mandates Strict Equal Protection Scrutiny.

1. *Connecticut's permanent irrebuttable presumption of non-residency for tuition purposes penalizes and deters the appellees' right to travel and thus triggers strict equal protection review.*

Contrary to the argument of the State of Tennessee in *Dunn v. Blumstein,* 405 U.S. 330 (1972), and the position taken by the appellant in the case at bar, the right to travel interstate need not be actually deterred in order to invoke the more stringent standard of review under The Equal Protection Clause of the Fourteenth Amendment. The appellant's contention that the decision in *Shapiro v. Thompson,* 394 U.S. 618 (1969), was premised upon an actual finding of deterrence to interstate movement "represents a fundamental misunderstanding of the law." *Dunn v. Blumstein,* 405 U.S. 330, 339 (1972) (footnote omitted). In so ruling, this Court in *Dunn, supra,* reasoned as follows:

> Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence. 405 U.S. at 339-40 (footnote omitted).

Furthermore, the Court in *Dunn* in reliance upon *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969), held that quite apart from any purpose to deter, "the compelling State interest test would be triggered by 'any classification which served to *penalize* the exercise of that

right [to travel] . . .' " *Dunn, supra,* 405 U.S. at 340 (emphasis supplied) (citations omitted).

In the instant case appellees maintain that the permanent irrebuttable classification of Conn. Gen. Stat. §10-329(b) both deters and penalizes their fundamental right to travel. With respect to deterrence, both appellees tendered uncontroverted testimony that had they known of the fact that they would have been permanently classified as "out-of-state" students pursuant to Conn. Gen. Stat. §10-329(b), they would not have traveled to Connecticut to become bona-fide residents and attend the University of Connecticut. *See,* testimony of appellee Kline (App., at 21a-22a, Tr., at 28-29); testimony of appellee Catapano (App., at 23a, Tr., at 43-44). Indeed, appellee Kline testified that she "would have remained in California" to complete her education. (App., at 22a, Tr., at 28).[13]

[13] Statistical studies support the premise that the migration of students in colleges and universities is steadily decreasing. The following table indicates that the national percentage of student migration declined from 18.2% in 1963 to 16.8% in 1968.

TABLE 1

Number of College Migrants, Public and Private Institutions, United States, 1938-68

	All Migrants		*Migrants in Public Institutions*		*Migrants in Private Institutions*	
Year	*Number*	*Percent**	*Number*	*Percent***	*Number*	*Percent****
1968	1,104,632	16.8	425,755	9.2	678,877	34.8
1963	750,690	18.2	256,396	10.0	494,294	31.7
1958	528,663	18.5	168,530	10.1	360,133	29.6
1949	496,921	20.0	151,302	12.0	345,619	28.1
1938	236,444	19.4	n.a.	n.a.	n.a.	n.a.

* Percentage based on total enrollment in all institutions.
** Percentage based on total enrollment in public institutions.
*** Percentage based on total enrollment in private institutions.

Since both appellees applied to the University of Connecticut from without the State, and having been accepted moved into the State to establish bona-fide residence and attend the University, the operation of Conn. Gen. Stat. Section 10-329(b) directly penalizes them for recent travel. While the Court below found both appellees to be bona-fide residents of the State of Connecticut, *Kline v. Vlandis*, 346 F. Supp. 526, 529 (D. Conn., 1972), both were nevertheless classified as "out-of-state" students pursuant to the statute and were required to pay $800.00 more per year than the other bona-fide residents classified as "in-state" students. *See*, App., at 19a, Defendant's Exhibit 1. Speaking of similar treatment of prospective voters in Tennessee, Mr. Justice Marshall emphasized in *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972):

Steahr, and Schmid, *College Student Migration in the United States*, Journal of Higher Education, Vol. XLIII, No. 6, Table 1, 441, 445 (June, 1972).

The study further indicates that the State of Connecticut ranked 46th nationally from 1949 to 1968 in terms of net in-migration of college students to all institutions of higher learning. *Id.*, Table 2, at 448-49. In fact, in 1968 Connecticut had a net out-migration total of 22,081 college students. *Id.*

In another statistical study compiled by the United States Department of Health, Education, and Welfare, entitled, *Analytic Report on Residence and Migration of College Students* (1968), the observation is made at 2 that:

> Despite a general feeling that mobility in our society is increasing, between 1963 and 1968 the percentage of students who went outside their home states to attend colleges or universities actually declined by two percentage points.

The HEW Study concludes significantly, that "higher out-of-State tuition fees tend to discourage migration across State lines." *Id.*

> It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution . . . 'Constitutional rights would be of little value if they could be . . . indirectly denied' . . . (citations omitted) (footnote omitted).

This Court has consistently struck down the imposition of other monetary penalties where the statute sought to penalize persons solely on the basis of recent travel.[14] Hence, even where travel is not absolutely prohibited, the statute is invalid in the absence of a compelling state interest. *See, Dunn v. Blumstein,* 405 U.S. 330, 342 (1972).

The right to travel interstate is not a meaningless right of mere movement. It necessarily includes the option of establishing a new residence wherever one chooses throughout this country and the opportunity to partake in both the burdens and benefits of citizenship. As discussed above the Connecticut statute in question not only serves as a deterrent to travel but also imposes a severe monetary penalty upon new bona-fide residents solely upon their recent exercise of this fundamental Constitutional right. Hence, the impingement created by the permanent, irrebuttable classification of Conn. Gen. Stat., Section 10-329(b) triggers the more demanding test of the Equal Protection Clause.

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[14] *See, Crandall v. Nevada,* 73 U.S. (6 Wall.) 35 (1868) (imposition of $1.00 capitation tax on railroad or stage coach passenger); *Harper v. Virginia Board of Electors,* 383 U.S. 663, 668 (1966), (imposition of a $1.50 poll tax); *Mullaney v. Anderson,* 342 U.S. 415, 416 (1952) (a $50.00 non-resident fishing license fee); *Toomer v. Witsell,* 334 U.S. 385, 395 (1948) (a $1.50 marine hospital fee). *See also, Dunn v. Blumstein,* 405 U.S. 330, 340 n.9 (1972).

2. *Since the fundamental right to travel is penalized by the operation of Conn. Gen. Stat., Section 10-329(b), the statute must be analyzed under the compelling state interest test.*

It is now axiomatic that before fundamental constitutional rights may be impinged upon, the State must demonstrate a compelling state interest. This strict standard under the Fourteenth Amendment applies not only to enumerate[15] and generic[16] rights, but also to those fundamental rights to which this Court has ascribed no particular source. Recently this Court has held that a woman's right to terminate her pregnancy stems directly from her right to personal privacy, a right deemed fundamental regardless of its source. *Roe v. Wade*, ___ U.S. ____ (1973) (41 U.S.L.W. 4213, 4225-26).[17]

The effect of Conn. Gen. Stat., Section 10-329(b) is to absolutely bar persons, who are considered bona-fide residents in the state for all other purposes, from becoming residents for tuition purposes. This absolute proscription of resident status for tuition purposes penalizes a new resident who is also a student, for his

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[15] *See*, e.g., *Near v. Minnesota*, 283 U.S. 697 (1913) (freedom of press).

[16] *See*, e.g., *NAACP v. Alabama*, 357 U.S. 449, 463 (1958), (freedom of association).

[17] In so holding, Mr. Justice Blackmun, writing for the majority, stated at 4225:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

entire stay at an institution of higher learning in Connecticut by subjecting him to higher fees. Furthermore, the irrebuttable statutory classification acutely penalizes those bona-fide Connecticut residents who have recently traveled from outside of the State.[18]

This arbitrary and invidious discrimination penalizes only the newly arrived Connecticut resident by denying him any opportunity to rebut the presumption of non-resident status under any set of circumstances. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court explicitly rejected the traditional "rational relationship" standard under equal protection:

> At the outset, we reject appellant's argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. [citations omitted]. The wating-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.
>
> *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

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[18]It is now clear that the concept of travel includes the "freedom to *enter* and *abide* in any State in the Union." Mitchell, *supra*, 400 U.S., at 285 (opinion of Stewart, J., with whom Burger, C.J., and Blackmun, J., joined concurring). Guest, *supra*, 383 U.S., at 757-60; *Truax v. Raich*, 239 U.S. 33, 39 (1915); Dunn, *supra*, 405 U.S., at 338.

While this Court in *Dunn v. Blumstein*, 405 U.S. 330 (1972) adopted the more stringent standard for equal protection review enunciated in *Shapiro*, the Court was more explicit in attempting to further clarify the meaning of the standard when it stated at 343:

> It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," NAACP v. Button, 371 U.S. 415, 438, 9 L Ed 405, 421, 83 S Ct 328 (1963); United States v. Robel, 389 US 258, 265, 19 L Ed 2d 508, 514, 88 S Ct 419 (1967), and must be "tailored" to serve their legitimate objectives. Shapiro v. Thompson, supra, 394 US at 631, 22 L Ed 2d at 613. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." Shelton v. Tucker, 364 US 479, 488, 5 L Ed 2d 231, 237, 81 S Ct 247 (1960).

Although Conn. Gen. Stat., Section 10-329(b) is drawn with "precision", the appellees submit that it is not "tailored" to serve legitimate objectives of the State of Connecticut. As discussed *infra*, the statute is over-inclusive: it classified a bona-fide resident as an "out-of-state" student if application was made from without the State of Connecticut. There exist "less drastic means," the use of reasonable indicia of domiciliary intent, to distinguish the true bona-fide resident from the "out-of-

state" student. Thus, whether the affected interest involves welfare benefits or tuition fees,

> [D]urational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are "*necessary* to promote a *compelling* governmental interest."
> *Shapiro v. Thompson, supra,* 394 U.S. at 634. *Dunn v. Blumstein,* 405 U.S. 330, 342 (1972) (citations omitted).

3. *The appellant's proffered justifications for the permanent, irrebuttable classification in question do not satisfy the compelling state interest standard under the Equal Protection Clause.*

a. Connecticut's objective of a partial cost equalization of higher education does not rise to the level of a compelling state interest.

The appellant contends that one of the objectives of Conn. Gen. Stat., Section 10-329(b) is an attempt by the Connecticut Legislature to equalize the cost of public higher education based upon the unproven assumption "that the resident or his parents have supported the State in the past and will continue to do so in the future." (Appellant's Brief on the Merits, at 11). As discussed *infra,* this attempted justification is not even sufficient to satisfy the traditional standard of review under the Equal Protection Clause.

In *Shapiro v. Thompson,* 394 U.S. 618 (1969), this Court expressly ruled that it is not a constitutionally permissible state objective to base a classification on the past tax contributions made by long-term residents to the State. *See, Shapiro, supra,* 394 U.S., at 632. In its

wisdom the Court foresaw the impact of a contrary result:

> Appellant's reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contribution of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.
> *Shapiro, supra,* 394 U.S. at 632-33 (footnote omitted).

See also, Boddie v. Connecticut, 401 U.S. 371, 381 (1971); *Goldberg v. Kelly,* 397 U.S. 254, 265-66 (1970); *Rinaldi v. Yeager,* 384 U.S. 305 (1966); *Toomer v. Witsell,* 334 U.S. 385, 396-99 (1948); *Edwards v. California,* 314 U.S. 160 (1941).

However, even if the State of Connecticut is not constitutionally required to maintain institutions of higher learning, once it has undertaken to provide them, they are state facilities which must be made available to *all* bona-fide residents on equal terms. *See, Brown v. Board of Education,* 347 U.S. 483, 493 (1954). In *Shapiro v. Thompson,* 394 U.S. 618 (1969), this Court rejected the appellants' argument that cost equalization satisfied their burden of demonstrating a compelling governmental interest. In the case at bar, appellant's assertion of the same objectives serves to promote an invidious discrimination between two classes of bona-fide residents. Those students who have recently traveled into Connecticut and have established bona-fide residence are required by the express language of Conn. Gen. Stat., Section 10-329(b) to pay higher tuition fees than long-term bona-fide residents. Where invidious discrimina-

tion is mandated, the objective of partial cost equalization cannot be judicially sanctioned as a compelling state interest.

b. Connecticut's objective in establishing with administrative certainty the domiciliary intent of its college students does not satisfy the compelling state interest test.

Appellant recites that a second objective of the permanent, irrebuttable classification contained in Conn. Gen. Stat., Section 10-329(b) is to afford the State of Connecticut the opportunity to determine with "a degree of administrative certainty" the domicile of students who attend the University of Connecticut. As the appellant stated in his Brief on the Merits, at 15:

> Domiciliary intent is often difficult to determine for college students who seldom have set plans for their future homes. Use of durational residence requirements provides a degree of administrative certainty for both the institution and the student.

In *Dunn v. Blumstein*, 405 U.S. 330 (1972), Tennessee argued that prevention of fraud was a justifiable purpose of the one year durational residency law. But as Mr. Justice Marshall concluded in *Dunn*, ". . . if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." 405 U.S., at 343. In striking down Tennessee's asserted purpose the Court found that the oath requirement, a "less drastic means' than the durational residency requirement, was altogether sufficient to protect against abuse of the registration process. 405 U.S., at 353.

In the case at bar appellees submit that "domiciliary intent", can be achieved through less restrictive means

than the permanent, irrebuttable presumption of non-residency in Conn. Gen. Stat., Section 10-329(b). Indeed, "domiciliary intent" may be exhibited through traditional indicia of residency. Thus, appellees submit that Connecticut's interest in "administrative certainty" is satisfied through a means of greater, not lesser, interference with their constitutional right to travel. For this reason, the appellant has failed to demonstrate a compelling state interest which justifies the penalization of their fundamental Constitutional right.

4. *The lower court cases of Kirk v. Board of Regents and Starns v. Malkerson, are a misunderstanding of the law of Shapiro as interpreted by Dunn v. Blumstein.*

Appellant erroneously contends that the Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969), exempted from future consideration all durational residency requirements save the one precluding newly arrived residents from receiving public assistance benefits. *Shapiro, supra*, at 638 n. 21.[19] (Appellant's Brief on the Merits, at 6). Were this contention viable the voting durational residency requirements in *Dunn v. Blumstein*, 405 U.S. 330 (1972), would never have been struck down. Since *Dunn* found unconstitutional Tennessee's durational residency requirement affecting the right to vote, appellees submit that the permanent irrebuttable classification of bona-fide Connecticut residents as non-

[19] The Court in *Shapiro* stated:

> We imply no view of the validity of waiting period or residence requirements determining eligibility to vote, eligibility for tuition free education, to obtain a license to practice a profession, to hunt or fish, and so forth. . . ."
> 394 U.S., at 638 n. 21 (1969).

residents for tuition purposes is of equal constitutional repugnance. Alternatively, appellees contend that the impact of n. 21 in *Shapiro, supra*, 394 U.S., at 638, was to leave for future consideration and scrutiny by the Court all durational residency requirements not squarely presented or challenged in *Shapiro*.[20]

In light of *Dunn* and *Shapiro*, appellant's reliance upon other cases concerning durational residency requirements affecting tuition for higher education is also misplaced. In *Kirk v. Board of Regents of University of California*, 273 Cal. App.2d 430, 78 Cal. Rptr. 260 (1st Dist. Ct. App., 1969), *appeal dismissed*, 396 U.S. 554 (1970), the lower court premised its decision upon a fundamental misunderstanding of the law of *Shapiro*, in light of *Dunn*, and a narrow and erroneous interpretation of n. 21 in *Shapiro*. The *Kirk* Court in discussing *Shapiro* chose to ignore the compelling state interest test to determine if there was a deterrence to travel. The court based its decision on a finding of no *actual* deterrence to travel by emphasizing the importance of n. 21 in *Shapiro*.

In so holding the *Kirk* Court stated:

> We do not think the addition of this footnote was an idle act to indicate the obvious fact that the opinion dealt merely with the questions presented.

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[20] This Court's decision in *Dunn v. Blumstein*, 405 U.S. 330 (1972), has unravelled at least one of the enigmatic implications of n. 21 in *Shapiro, supra*, 394 U.S., at 638. As the then Chief Justice Warren correctly pointed out:

> If a state would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote.
>
> *Id.*, at 654 (Warren, C.J. dissenting).

> Rather, we read the footnote to mean that the court did not necessarily intend to apply the same standards to other residents requirements like the one here in question.
> *Id.*, 78 Cal. Rptr., at 266.

Further, the court in *Kirk* incorrectly ascribed a higher value to obtaining welfare than to obtaining an education. We submit that in light of *Dunn*, the *Kirk* court's interpretation of *Shapiro* cannot stand, and is a fundamental misunderstanding of the law of *Shapiro*. *See*, *Dunn v. Blumstein*, 405 U.S., at 339.

The appellant also places a great emphasis upon *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn., 1970), (three-judge court), *aff'd mem.*, 401 U.S. 985 (1971). (Appellant's Brief on the Merits, at 6-7). We respectfully submit that *Dunn* effectively negated the *Starns* court's reasoning. In *Starns* the court was faced with a one year durational residency requirement. In discussing the deterrence to travel the *Starns* court attempted to distinguish *Shapiro* in two ways. First, the court read *Shapiro* to require that the tuition regulation must have the objective of actual deterrence of the right to travel to require the compelling interest test:

> Here, by contrast, there are no state of facts upon which this Court could posit, as a finding of fact, that the one year waiting period for resident tuition purposes was a specific objective excluding or even deterring out-of-state students from attending the University.
> *Starns, supra*, 326 F. Supp., at 237.

Second, the court in *Starns* based its decision on the fact that "*Shapiro* . . . had the effect of denying the basic necessities of life to needy residents." *Id.*, at 238. It then concluded that the "deterrent effect on interstate move-

ment . . . was readily apparent" in *Shapiro* and not so in *Starns*. *Id.* "There is no showing here that the one-year waiting period has any dire effects on the non-resident student equivalent to those noted in *Shapiro*." *Id.*[21] In *Dunn*, Mr. Justice Marshall clearly pointed out that "it is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel." 405 U.S. at 339 (1972). In effect the *Starns* decision is based upon the fact that the right to travel was not abridged in any constitutionally relevant sense. Just as the State of Tennessee's argument was rejected by *Dunn*, so too must the appellant's reliance upon *Kirk* and *Starns* fail. The *Dunn* Court has exposed the errors of the decisions in both *Kirk* and *Starns*. As *Dunn* has implied, regardless of the entitlement affected by the durational residency requirement:

> [D]urational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are "*necessary* to promote a *compelling* governmental interest."
> *Dunn, supra*, 405 U.S. 330, 340-41. (emphasis supplied) (Citations omitted).[22]

In light of *Dunn*, appellees submit that as demonstrated above, the purposes proferred by the appellant do not satisfy the compelling state interest test.

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[21] The case of *Glusman v. Trustees of University of North Carolina*, 281 N.C. 620, 629, 190 S.E.2d 213, 219 (1972) is irrelevant to an argument on the fundamental right to travel since plaintiffs therein stipulated that the regulations in that case do not impede interstate travel.
(Appellant's Brief on the Merits, at 12).

[22] The strict equal protection test is no longer limited, if ever it once was, to situations in which the denial of a particular state benefit produces "dire effects". *Starns, supra*, 326 F. Supp., at

II.

EVEN UNDER THE TRADITIONAL EQUAL PROTECTION STANDARD, CONNECTICUT'S PERMANENT, IRREBUTTABLE PRESUMPTION OF NON-RESIDENCY IMPOSED ON BONA FIDE CONNECTICUT RESIDENTS FOR THE PURPOSE OF REQUIRING HIGHER TUITION PAYMENTS BEARS NO RATIONAL RELATION TO A LEGITIMATE GOVERNMENTAL INTEREST.

A. The Court Below Clearly Applied the Rational Equal Protection Test, and Concluded That Connecticut's Permanent, Irrebuttable Presumption of Non-Residency Imposed on Bona Fide Connecticut Residents Is Unconstitutional as Not Rationally Related to a Legitimate State Purpose.

The basic principles governing the application of the Equal Protection Clause of the Fourteenth Amendment were recently set out by the CHIEF JUSTICE in *Reed v. Reed*, 404 U.S. 71, 75-76 (1971):[23]

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238. The same limitation was urged upon this Court last term with respect to the Due Process Clause. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), Mr. Justice Stewart, writing for the majority, interred the unfounded conclusion that a prior "due process" hearing is required only in cases presenting property interests amounting to "absolute necessity", as was the case with welfare benefits in *Goldberg v. Kelly*, 397 U.S. 254 (1970). In construing the Due Process Clause the Court re-stated the long-standing principle that the potential loss to the individual involved need only amount to an "important interest", not an "absolute necessity." *Fuentes, supra*, 407 U.S. 67, 89; *Bell v. Burson*, 402 U.S. 535, 539 (1971). By analogy this same rejection must be applied to the classification in question.

[23] As quoted by Mr. Justice Brenan in his opinion for the Court in *Eisenstadt v. Baird*, 405 U.S. 438, 446-47 (1972).

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly*, 113 U.S. 27 (1885); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1968). The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

In invalidating Connecticut's out-of-state tuition statute, Judge Blumenfeld, writing for the Court below, intentionally applied these principles and clearly set out the rational basis standard. In partially quoting from this Court's opinion in *Eisenstadt v. Baird*, he stated:

> . . . since the statute is stigmatized as so arbitrary and unreasonable by its own terms as to be unconstitutional, we do not reach the question of whether to test the validity of the "out-of-state" classification as being 'not merely *rationally related* to a valid public purpose, but necessary to the achievement of a *compelling* state interest.' Eisenstadt v. Baird, 40 U.S.L.W. 4303, 4306 n. 7 (U.S., Mar. 22, 1972).

Kline v. Vlandis, 346 F. Supp. 526, 529 n. 4 (1972) (emphasis in original).[24]

The Court clearly applied this standard as follows:

It is not enough to say that the state has power to treat different classes of persons in different ways, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); the classification must be reasonable, not arbitrary, and rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). See also, *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Assuming that it is permissible for the state to impose a heavier burden of tuition and fees on non-resident than on resident students, that state may not classify as "out-of-state students" those who do not belong in that class. *Kline v. Vlandis*, 346 F.Supp. 526, 528 (1972).[25]

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[24]The footnote to *Eisenstadt* continues:

But just as in Reed v. Reed, supra, we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

[25]Connecticut is not without guidance on these principles in its own law. In *Valentine v. Pollak*, 95 Conn. 556, 561, 111 A. 869, 871 (1920) the Connecticut Supreme Court stated: "A presumption of law must be based upon facts of universal experience and be controlled by inexorable logic." (no conclusive presumption of alienation of affection in every case of adultery). In *Duscharme v. City of Putnam*, 161 Conn. 135, 141-43, 285 A.2d 318, 321 (1971), the Court held that a conclusive presumption which barred an employer from attempting to prove an employee's heart ailment was not causally connected to employment, violated Equal Protection. The Court stated:

Constitutionally, the legislature can no more bind the courts to such a factually unsupportable conclusive adjudication

Thus, the appellant has misunderstood the lower court opinion in submitting that the lower court failed to utilize this standard. (Appellant's Brief on the Merits, at 5).

B. Connecticut's Permanent Irrebuttable Presumption of Non-Residency Is Unconstitutional in that It Is Not Rationally Related to the Purpose of Distinguishing Between Bona Fide Connecticut Residents and Non-Residents for the Proffered Purpose of Equalizing the Cost of Higher Education.

1. *The criterion employed is not rationally related to the objective of proving domicile.*

It is important to note what is not at issue in this case. The unanimous opinion of the Three-Judge District Court did *not* invalidate the option of the state to classify students as resident and non-resident students thereby obligating non-resident students to pay a higher tuition than that paid by bona fide residents. Nor did that opinion invalidate the option of the state to use a durational residency test as a rebuttable presumption of non-residency.[26]

The opinion merely invalidated the option of the state to use a conclusive presumption to classify new bona fide Connecticut residents as something they are not. As the Court clearly stated:

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than it can require their adjudication that a camel is a horse by the enactment of a statutory conclusive presumption that all four-footed animals are horses. *Cf. Heiner v. Donnan*, 285 U.S. 312, 328-29 (1932).

[26] Consistent of course, with the standards in *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Dunn v. Blumstein*, 405 U.S. 330 (1972).

> Assuming that it is permissible for a state to impose a heavier burden of tuition and fees on non-resident than on resident students, that state may not classify as "out-of-state students" those who do not belong in that class.
> *Kline v. Vlandis*, 346 F.Supp. 526, 529 (1972).

The narrow issue presented by this case is whether a state may, consistent with the Equal Protection Clause, impose a permanent, irrebuttable presumption of non-residency for tuition purposes upon new bona fide Connecticut residents solely on the criterion that those persons lived outside Connecticut when they filed their application, and without regard to any other attendant facts and circumstances.

Section 10-329(b) of the Connecticut General Statutes states that a married student shall be classified as "out-of-state" if his "legal address at the time of his application . . . was outside of Connecticut."

With respect to single students, the statute provides that a student will be classified as "out-of-state" if his legal address "for any part of the one-year period immediately prior to his application . . . was outside of Connecticut."

These classifications are irreversible. They may never change since the statute further commands that:

> The status of a student, as established at the time of his application for admission at a constituent unit of the state system of higher education . . . shall be his status for the entire period of his attendance at such constituent unit.[27]

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[27] Conn.Gen.Stat., Section 10-329(b)(App. 11a).

Connecticut's durational residency provision for tuition purposes divides new bona fide residents into two classes based wholly on recent migration. The only distinction between these two classes of bona fide residents is that some have had a legal address within the state *before* applying to college and some have not (with the additional unexplained burden that unmarried people must have had a legal address within the state for at least one year before applying).[28] These new bona fide resident students are forever cast into the same classification as are out-of-state non-resident students.

Once a permanent classification has been shown, it becomes the duty of the state, under traditional review, to furnish a legitimately defensible difference. To satisfy the reduced burden of justification under the traditional equal protection standard, the state must show (a) that it has a legitimate policy goal it is seeking to promote, and (b) that there is a rational relationship between the end sought and the chosen means to that end. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

The appellant proffers that the purpose of this scheme is to attempt to equalize the cost of education between those who are bona fide citizens of the State of Connecticut and those that are not. (Appellant's Brief on the Merits, at 15).[29] Implicit in this reasoning is the assumption that the state may require proof of the bona fides of its citizens before allowing them to enjoy the benefit of reduced tuition. *See, Glusman v. Trustees of*

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[28] See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[29] The Appellant states: "By fixing a students' residence status in this manner the state insures that its bona fide in-state students will receive their full subsidy." (Appellant's Brief on the Merits, at 15).

the University of North Carolina, 218 N.C. 620, 190 S.E.2d 215, 220 (1972) (quoted in Appellant's Brief on the Merits, at 13). To sustain this assumption the appellant must show that there is a rational relationship between this end and the chosen criteria (where the person lived when he applied) and the means (an irreversible determination of non-residency). *McGowan v. Maryland, supra.* The permanent classification of a Connecticut resident into the status of an out-of-state non-resident student solely on the basis of that person's address when he submitted his college application is not rationally related to this objective. *See, Turner v. Fouche*, 396 U.S. 346, 394 (1970); *Tot v. United States*, 319 U.S. 463, 467 (1943).

The objective of equalizing the cost of public higher education between bona fide Connecticut citizens and non-residents may not be without some legitimacy. However, basing the bona fides of citizenship on the sole test of where a person lived when he applied to the University of Connecticut is a criterion wholly unrelated to the objective of that statute. *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). (Sex as a criterion wholly unrelated to qualification as executor of a decedent's estate).

In *Turner v. Fouche*, the Court invalidated the Georgia requirement that one be a freeholder to qualify for school board membership on the ground that it was not rationally related to the purpose of responsible participation in education decisions. As Mr. Justice Stewart stated for the unanimous Court:

> However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that that quality is necessarily wanting in all citizens of the County whose estates are less than freehold.
> *Turner v. Fouche*, 396 U.S. 346 (1970).

So too in the instant case. The lack of domiciliary intent cannot rationally be conclusively presumed from the fact that one applied to the University of Connecticut from outside of the state, as is evident from the situation of appellee Kline. As the Court stated in *Mobile, J.&K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910):

> That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. *So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.* (death occuring in the operation of locomotive is prima facie evidence of negligence). (emphasis added).

In the instant case, the appellees are permanently denied the right to present evidence to overcome the conclusion that, solely because they are students who applied from outside Connecticut, they are not and may never become bona fide residents. It is this *a priori* notion that violates equal protection. The irrationality of this scheme is magnified by the fact that the lower Court specifically found both appellees to be bona fide residents of the State of Connecticut.

Lastly, the scheme falls by the weight of its own contradictions. The appellant states that:

> By fixing a student's residence status in this manner the state insures that its bona fide in-state students will receive their full subsidy.
> (Appellant's Brief on the Merits, at 15).

Logically, it is impossible for bona fide Connecticut residents who attend college in Connecticut to be ont-of-state students. Instead, the statute insures that the appellee domiciliaries who are in-state students will in fact *not* receive their full subsidy.

Thus, this scheme, based solely on the presumption that since a student applied to the University from out of state, he may never become a resident, and which precludes the offer of any proof of a change in circumstances, is not rationally related to the objective of proving domicile.

2. *Reasonable criteria for determining bona fide residence are not only available, but are now in use by the appellant.*

The criteria related to the establishment of a bona fide residence within a state must logically include an examination of those indicia constituting domicile within that state. Indeed, since the law in question was invalidated, Connecticut, through an official opinion of the Attorney General of the State, has adopted relevant criteria for evaluating domicile.[30] These criteria state:

> Each individual case must be decided on its own particular facts. In reviewing a claim [for re-classification] *relevant criteria* include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc. (emphasis added).

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[30] These criteria appear in an Opinion of The Attorney General of the State of Connecticut, dated September 6, 1972, which is unreported. The text is reproduced as Appendix A to this Brief. It is noteworthy that this official opinion is signed also by appellant's counsel.

Noticeable by its absence is any reference to where the student lived when he *filed* his application.

Depending upon the facts and circumstances of each individual situation, the new criteria permit the adoption of no waiting period, or a flexible waiting period for reclassification as a resident student.[31] The new criteria permit reclassification at the beginning of each semester. In addition, the University has appointed a "Residency Hearing Officer" and has established an appeal procedure to the University Provost for review.

The mere fact that Mrs. Kline was unfortuitous enough to apply from California should not bar her from ever asserting bona fide residence in Connecticut. So too with the appellee, Catapano. The appellant claims that the durational residency requirement with respect to single students is easily satisfied since "an individual may delay his studies [for one year] and establish in-state residency for a future application." (Appellant's Brief on the Merits, at 5). Such a burden and penalty on a new bona fide resident is unreasonable. As the court noted in *Shapiro*:

> Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional.
> *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

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[31] *See*, answers to questions 3 and 5, at 3a, 4a in the Appendix to this Brief.

As has been pointed out above, reasonable criteria of bona fides exist so that appellant has no need to use this requirement for the governmental purposes suggested.[32]

C. Cost Equalization Between New Bona Fide Residents and Old Bona Fide Residents on the Basis of Contributions Made Through the Payment of Taxes Is an Impermissible State Purpose.

The issue presented in this case is not cost equalization between resident and non-resident students but the use of an irrational-irrebuttable presumption which classifies residents as non-residents. Cost equalization is not a proper reason for distinguishing between two classes of bona fide residents both composed of citizens of the State of Connecticut. *Shapiro* forbids the state from allocating services among its citizens on the basis of their higher past tax contribution. *Shapiro v. Thompson*, 394 U.S. 618, 632-33 (1969).

Nor is it true that "all new residents are required to pay a greater portion of the cost of their education" as the appellant claims.[33] (Appellant's Brief on the Merits,

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[32] "The largest criticism of the tuition waiting period as a device for proving domiciliary intent is that its burden falls too often on people whose intent is not seriously doubted. While the waiting period is aimed at discouraging students from seeking resident status when they do not really intend to become residents, too often it works a hardship by denying a student who is clearly a permanent resident benefits given to other residents. Such a hardship could be avoided if the waiting period requirement could be waived in cases where the student presented unusually convincing evidence of domiciliary intent."
Note, *The Constitutionality of Non-Resident Tuition*, 55 Minn. L.Rev. 1139, 1158-59 (1971).

[33] Even if the appellant's position were true, the contention that the demands of equal protection are fully met when the law applies

at 10). A close analysis of a few examples under this scheme will reveal its irrational and invidious nature. The strongest example is the case in question. The appellee Kline is a transfer student who married a life-long Connecticut domiciliary. She applied to the University and was accepted. It is undisputed that she then moved to Connecticut and established a permanent home. She has a Connecticut driver's license, her car is registered in Connecticut, and she is registered as a Connecticut voter. In spite of all these indicia of domicile, she is permanently and irreversibly deemed to be a non-resident student and forced to pay twice as much tuition as older Connecticut residents. Yet, under this scheme a married transfer student who moves to Connecticut one day before he applies to graduate school is entitled to the in-state tuition benefit completely and wholly without regard to any indicia of domicile. The appellee Catapano, however, who applied from out-of-state, moved her residence to Connecticut, acquired a Connecticut driver's license and car registration and who has been found by the lower court to be a bona fide resident, is permanently and irreversibly deemed to be a non-resident student because she did not live in Connecticut for a full year before she applied to the University.

Nor are these exceptional circumstances. A family moves to Connecticut for a new start, the father acquires a job, pays taxes, and the children attend public school.

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equally to all within the statutory class has been soundly repudiated. *Compare, Poinell v. Pennsylvania,* 127 U.S. 678, 687 (1888) *with McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) where the Court stated:

> Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation.

See also, Carrington v. Rash, 380 U.S. 89, 93 (1965).

The young boy finishes his senior year in high school and applies to the University of Connecticut and is permanently classified an out-of-state student because he has not had a legal address in Connecticut for a full year. A life-long Connecticut resident, whose parents are citizens of the state and who temporarily moved to another state for a short period of time and then returned to Connecticut to attend college would now and permanently be classified as an out-of-state student. Surely, this flies in the face of the proffered purpose of equalizing the cost of higher education between bona fide Connecticut citizens and out-of-state students.

Nor will it suffice to claim legitimacy for this scheme and deny its invidiousness by merely stating that it is reasonable to favor "established residents," (Appellant's Brief on the Merits, at 11) when there is no way of "establishing" that residency. In *Carrington v. Rash*, 380 U.S. 89, 96 (1965), Mr. Justice Stewart, writing for the Court, stated that while a state is free to take reasonable steps to see that all applicants to vote actually fulfill the requirements of bona fide residence:

> By forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment.

Thus, the newly arrived resident suffers most from the arbitrary action spoken of by Mr. Justice Jackson concurring in *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949)[34] where he warned of the danger when officials are allowed

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[34] Cited in *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

> . . . to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Nor will it suffice to deny absurdity for this permanent, irreversible scheme by stating merely that it provides degree of "administrative certainty" for the student. (Appellant's Brief on the Merits, at 15). For the poor student, the certainty is of a different kind. Administrative convenience is not a matter which will allow invidious discrimination against the class of newly arrived bona fide residents. *Shapiro v. Thompson*, 394 U.S. 618, 636, 638 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972). *See also*, *Carrington v. Rash*, 380 U.S. 89 (1965).

Thus, by imposing an invidious discrimination on new bona fide residents the Connecticut system of permanent tuition classification violates the standard set in *Dandridge v. Williams*, 397 U.S. 417, 487 (1970) and *Jefferson v. Hackney*, 406 U.S. 535 (1972). The irrebuttable presumption of non-residency is invidious because there is not even a tenuous connection between the classification of residents and non-residents and the procedure employed in the case at bar, permanently imposing out-of-state status on a new bona fide resident. As the lower Court concluded ". . . the statute is stigmatized as being so arbitrary and unreasonable by its own terms as to be unconstitutional . . ." *Kline v. Vlandis*, 346 F.Supp. 526, 529 n. 4 (1972). Thus, the constitutional guarantee of equal protection limits the state's power to absolutely deny a bona fide Connecticut resident the opportunity of being reclassified as a resident student.

D. The Reasoning in the Lower Court Cases of *Clark v. Redeker*, and *Starns v. Malkerson*, applying *Carrington* Will Not Support Appellant's Contention That a Permanent and Absolute Classification of Non-Residency Is Constitutionally Rational.

The case of *Newman v. Graham*, 82 Idaho 90, 349 P.2d 716 (1960) is directly in point. Just as in Connecticut, the Idaho regulation provided that any student classified as a non-resident for tuition purposes was to retain that status throughout his tenure at the university. The Idaho court, in striking down the regulation said at 349 P.2d 719:

> It does not afford any opportunity to show a change of residential or domiciliary status and does in effect deny equality of opportunity to persons of the same class who are similarly situated and for that reason it is an unreasonable regulation. It is the denial to the applicant of an opportunity to be heard in the matter, within a reasonable time, that constitutes the objectionable feature of the regulation here considered.

In *Carrington v. Rash*, 380 U.S. 89 (1965), this Court has specifically ruled against the constitutionality of an irreversible resident classification. There the Court invalidated a section of the Texas Constitution which prevented a member of the Armed Services of the United States who first established his home in Texas during the course of his military duty from acquiring Texas residence for voting purposes so long as he remained a member of the Armed Forces. The Court recognized that although Texas had the right to require its voters to be residents, it held that by forbidding a serviceman the opportunity of ever controverting the presumption of

non-residence, the Texas Constitution imposed an invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment. *Id.*, at 96.

The State of Connecticut has done the same here. By denying a new Connecticut resident the opportunity of ever controverting the presumption of non-residence they have imposed the same type of invidious discrimination found present in the Idaho regulation in *Newman.*

The lower Federal Court Cases of *Clark v. Redeker* and *Starns v. Malkerson* will show first that the reasoning in *Carrington v. Rash*, 380 U.S. 89 (1965) is not limited to voting as the appellant claims (Appellant's Brief on the Merits, at 9-10) and second that those Courts' consideration of *Carrington* contains persuasive reasoning against the type of absolute and irreversible classification held unconstitutional in *Kline v. Vlandis.*

In *Clark v. Redeker*, 259 F.Supp. 117 (S.D. Iowa, 1966), 406 F.2d 883 (1969), *cert. denied*, 396 U.S. 862 (1969), Iowa tuition regulations imposed a one-year residency requirement before a student could be considered to be an Iowa resident. The regulations further set up a Review Committee to which a student might appeal his classification. In upholding the regulations the court held that they are not set up in terms of an absolute classification and noted:

> If appropriate facts and circumstances arise subsequent to a student's classification as a nonresident, there is *nothing in the regulations which would prevent his reclassification as a resident.* The student is merely required to present sufficient evidence to overcome the presumption of nonresidence.
> *Clark v. Redeker*, 259 F.Supp. 117, 122 (S.D. Iowa, 1966) (emphasis supplied).

In *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn., 1970) *aff'd. mem.* 401 U.S. 985 (1971), the court conceded that the Minnesota tuition regulations providing for a one-year residency requirement for out-of-state students economically discriminates against a class of residents. It stated that although there is a presumption of non-residency against a student from another state, that presumption can be overcome by sufficient evidence to show bona fide domiciliary within the state. The court concluded, that in Minnesota, there is ". . . *no arbitrary or permanent classification of the type found to constitute invidious discrimination in Carrington v. Rash . . .*" *Starns v. Malkerson, supra,* at 240 (emphasis added).

A third case from the Supreme Court of California is equally persuasive, *Kirk v. Board of Regents of University of California,* 273 Cal. App. 430, 78 Cal.Rptr. 260 (Ct. App., 1969), *Kirk* following *Clark v. Redeker, supra,* upheld the one-year residency requirement and noted that in California the durational residency requirement is not set up in terms of an absolute classification. If appropriate facts and circumstances arise subsequent to a student's classification as a non-resident, "there is nothing in the regulation that would prevent petitioner's reclassification as a resident." The Court concluded that:

> There is here, unlike Newman and Carrington, no arbitrary permanent classification of non-residency which prohibits her from subsequently proving that she does, in fact, qualify for resident tuition.
> *Kirk v. Board of Regents of the University of California, supra,* at 269.

Clark, Starns and *Kirk* may further be distinguished on the basis that each was considering a one year waiting period for in-state tuition status. In the instant case the

classification is permanent. Further, the Courts in *Clark* and *Starns* did not have the benefit of this Court's opinion in *Dunn v. Blumstein*, 405 U.S. 330 (1972) as to the proper interpretation of *Shapiro*. Nor did the Courts in *Clark* and *Starns* have the evidence of actual deterrence in the record,[35] nor were they faced with a situation where, because of the financial penalty on the right to travel the appellees would not have been able to continue their education.[36] Therefore their decisions upholding a one-year waiting period are clearly distinguished on their facts alone.

We believe that this is the proper application of *Carrington*. Cases such as *Glusman v. Trustees of University of North Carolina*, 281 N.C. 620, 190 S.E.2d 213 (1972) and *Thompson v. Board of Regents*, 187 Neb. 285, 188 N.W.2d 840 (1971) have blindly followed *Clark* and *Kirk* and fundamentally misunderstood *Carrington* and *Shapiro*. As the dissent in *Thompson*, *supra*, pointed out:

> There is no rational or reasonable basis on which an individual who has been a bona fide resident of and domiciled in the state for the initial period of time required by statute, should be denied the right to

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[35] The right to travel issue was not raised in *Clark*.

[36] Oral argument and testimony in *Kline* was heard on January 7, 1972. However, on December 27, 1971, testimony on appellees' motion for a Preliminary Injunction was heard. The appellees were proceeding *in forma pauperis* and testified that they would be barred from attending class for the second semester if they failed to pay the full amount of out-of-state tuition and fees by January 3, 1972. Due to the fact that the University granted eleventh hour financial aid to the appellees, the motion was denied. (App. 1a), see, *Kline v. Vlandis*, 346 F. Supp. 526, 527 n.2 (1972).

> prove that fact simply because he was in attendance at 'any institution of learning in this state' . . . *Thompson v. Board of Regents,* 187 Neb. 285, 188 N.W.2d 840, 845 (1971) (dissenting opinion). See also, *Robertson v. Regents of the University of New Mexico,* 350 F. Supp. 100 (D.N.M. 1972).

Therefore, even under the traditional equal protection standard, Connecticut's permanent, irrebuttable presumption of non-residency for tuition purposes is not rationally related to a legitimate governmental interest.

III.

THE CLASSIFICATION OF BONA FIDE RESIDENTS OF THE STATE OF CONNECTICUT AS NON-RESIDENTS FOR THE PURPOSE OF REQUIRING HIGHER TUITION PAYMENTS VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

A. Connecticut's Utilization of a Classification Procedure Which Creates a Permanent Irrebuttable Presumption of Non-Residency Violates the Minimum Standards of Due Process Required Before the Deprivation of Constitutionally Protected Interests.

The manner in which appellees were deprived of their rights and property is violative of due process required under the Fourteenth Amendment.[37] The Connecticut statute classified Connecticut residents as non-resident

[37] In the lower court opinion, Judge Blumenfeld stated: "The plaintiffs rely on both the due process and the equal protection clause. We do not consider these separately because '. . . the concepts of equal protection and due process, both stemming from our American ideal of fairness are not mutually exclusive, . . . *'Boilling v. Sharpe*, 347 U.S. 497, 499 (1954)" *Kline v. Vlandis*, 346 F. Supp. 526, 528 (1972) (App.Jur. 4a). They are separated here for the convenience of argument.

out-of-state students under an irrebuttable presumption that out-of-state applicants are non-residents throughout their continuing scholastic careers. Appellees are not challenging the rationality of the state's classification of residents and non-residents for the purpose of tuition charges. It is the procedure utilized to classify that offends due process.

By legislating an irrebuttable presumption of non-residency, the state has deprived new bona fide resident students of any opportunity to rebut the factual assumption of non-residency. In this manner all newly arrived students are classified as non-residents without an opportunity for a hearing as to the applicability of the presumption to their case. As stated by the court below:

> Assuming that it is permissible for the state to impose a heavier burden of tuition and fees on non-resident than resident students, the state may not classify as 'out of state students' those who do not belong in that class.
> *Kline v. Vlandis*, 346 F.Supp. 526, 528 (1972).

In *Heiner v. Donnan*, 285 U.S. 312 (1932), this Court held that the failure to give a party an opportunity to demonstrate the inaccuracy of a statutory presumption violated the Due Process Clause. The statute in *Heiner* conclusively presumed that a transfer of property within two years of death was made in contemplation of death and a higher tax was imposed. The Court said:

> [W]hether the . . . presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality. . . . This court has held more than once that a statute creating a presumption which

> operates to deny a fair opportunity to rebut it violates the due process clause of the 14th Amendment.
> *Heiner v. Donnan*, 285 U.S. 312, 329 (1932).

Because statutes containing irrebuttable presumptions are devoid of any procedural safeguards whatsoever, they have been consistently struck down as unconstitutional by this Court. *See, Heiner v. Donnan*, 285 U.S. 312 (1932); *Schlesinger v. Wisconsin*, 270 U.S. 230 (1924); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); and *Carrington v. Rash*, 380 U.S. 89 (1965).

The argument typically put forth in support of a statutory irrebuttable presumption is that the classification procedure is a cost-saving device eliminating hearings and fraud.[38] The decisions have consistently pointed out that fundamental constitutional rights are superior to administrative efficiency and cost. *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Carrington v. Rash, supra*; and *Heiner v. Donnan*, 285 U.S. 312 (1932).[39] Additionally, irrebuttable presump-

[38] The State of Connecticut is free to create a rationally related rebuttable presumption of non-residency for out-of-state university applicants. The state did not see fit to implement such a procedure to protect its financial interest but now complains of the high cost required by the loss of their irrebuttable presumption.

[39] As the Court stated in *Heiner v. Donnan*, 285 U.S. 312, 328 (1932):

> to sustain the validity of this irrebuttable presumption it is argued, with apparent conviction, that under the prima facie presumption originally in force there had been a loss of revenue, and decisions holding that particular gifts were not made in contemplation of death are cited. This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a

tions are by their very nature counterproductive in denying state benefits and protection to the very people the state intends to benefit. *See, Stanley v. Illinois*, 405 U.S. 645 (1972). The purpose behind the statute in question, to require non-residents to pay additional tuition fees, is defeated when residents as opposed to non-residents are required to pay the additional tuition fees.

The statutory scheme in this case excludes the important factor of residency from the state's determination to deprive or grant the state provided entitlement in issue. Any hearing under the Connecticut statutory scheme would preclude inquiry into the issue of residency. Just as in *Bell v. Burson*, 402 U.S. 535 (1971), where the statutory scheme eliminated the important factor of liability from consideration in the depriving or granting of a driver's license, Connecticut eliminates from consideration the important factor of residency.[40] As the Court stated in *Bell*:

> The hearing required by the Due Process Clause must be 'meaningful,' *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L.Ed.2d 62, 66, 85 S.Ct. 1187 (1965) and 'appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Trust Co., supra*, at 313, 94 L.Ed. at 872, 873. It is a proposition which

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more thorough enforcement of the tax against the guilty, a new and startling doctrine, condemned by its mere statement and distinctly repudicated by this court in the Schlesinger's Case and Hoeper's Case . . ."
(citations omitted).

[40] Connecticut does not provide the type of meaningless hearing available under the Georgia statutory scheme in *Bell v. Burson, supra*. The Georgia statute violated the Due Process Clause not because it provided a meaningless hearing but because it provided for the deprivation of a state entitlement without a hearing on the determinative issue.

> hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard. *Bell v. Burson*, 402 U.S. 535, 542 (1971).

The Connecticut statutory scheme does not even provide the type of meaningless hearing present in *Bell v. Burson, supra.* Furthermore, a Connecticut hearing under Conn.Gen.Stat., Section 10-329(b) would have the same inherent flaw present in the Georgia statute in *Bell v. Burson.* Both statutes contain an irrebuttable presumption which precludes a hearing inquiry into the fundamental factor in the state's determination to grant or deny: in Georgia–liability, and in Connecticut–residency.

B. Connecticut's Irrebuttable Presumption of Non-Residency Deprives Appellees of Three Important Interests of Property, Interstate Travel, and a State Provided Education Without Due Process of Law.

In its opinion, the lower court examined the various indices of residency and found that Margaret Marsh Kline and Patricia Catapano were bona fide residents of the State of Connecticut. App. Jur. 5a-6a and *Kline v. Vlandis,* 364 F.Supp. 526, 527-528 (1972). In spite of their residency, both were classified as non-residents and permanently required to pay higher tuition charges. *Kline v. Vlandis, supra,* 527 and 528. The minimal effect of this statutory classification upon Connecticut student residents deprives them of property through increased tuition charges as a result of a permanent irrebuttable presumption contrary to fact. But for the initiation of this lawsuit the classification of the two appellees would

have caused the termination of their education in the State of Connecticut. Under threat of court injunction the University provided loans to these impoverished students to enable them to continue their education in spite of the additional tuition charges. *Kline v. Vlandis, supra,* 527 n. 2. The unrefuted testimony of both appellees demonstrated that the classification of non-residency could have forced appellees to continue their education outside of the State of Connecticut. (A. 22a and 23a). In Mrs. Kline's case she would have been prevented from traveling to and residing in the state in which her husband has a life-long residency.

The statutory classification of the resident appellees as non-residents terminates three important rights to which appellees are constitutionally entitled: property, inter-state travel, and state provided education.

1. *Property*

Through increased tuition charges appellees are deprived of their personal property by virtue of a totally incorrect but nevertheless irrebuttable presumption that they are non-residents. The 1972 tuition differential between. in-state and out-of-state students of $450.00 would have an obvious detrimental effect on appellees who are appearing *in forma pauperis.*

The importance of property to the individual and the necessity for due process before its deprivation is a basic component required by the due process clause. *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Heiner v. Donnan,* 285 U.S. 312 (1932); *Coe v. Armous Fertilizer Works,* 237 U.S. 413 (1915).

The importance of property rights was recently reaffirmed in *Lynch v. Household Finance*, 405 U.S. 538, 552 (1972):

> The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.

The fundamental interdependence between the personal right to liberty and property are amply demonstrated by the domino effect that the personal right to property deprivation has on appellees' right to travel and right to a state provided entitlement.

2. *Interstate travel.*

The irrebuttable and incorrect presumption of non-residency infringed upon appellees' right to travel to the point that appellee Kline would have remained in California had she been aware of the pending Connecticut non-residency classification. The injustice and the irrationality of the classification is such that she can no longer return to California as a student resident.[41] Once Margaret Kline established residency in Connecticut she became a student non-resident in Connecticut as well as in California.

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[41] 'A resident student' means any person who has been a bona fide resident of the state for more than one year immediately preceding the opening of the university.
Deering's California Codes, *Section 23054.*

The right to travel interstate is a fundamental constitutional right. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

3. *State provided education.*

The termination of higher education benefits provided by the State of Connecticut to its residents involves important constitutional rights.

This Court unanimously stressed the fundamental importance of educational opportunity in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

The analogy between education and voting is quite direct: both are crucial to participation in, and the functioning of, a democracy. Voting has been regarded as a fundamental right because it is "preservative of other basic civil and political rights. . . ." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities.

The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. This Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. The public school has been termed "the most

powerful agency for promoting cohesion among a heterogeneous democratic people . . . at once the symbol of our democracy and the most persuasive means for promoting our common destiny." *McCollum v. Board of Education*, 333 U.S. 203, 216, 231 (1948), (Frankfurter, J., concurring).

The California Supreme Court has recently considered statutory classifications touching upon education, and challenged on equal protection grounds. *Serrano v. Priest*, 487 P.2d 1241 (1971). In an opinion, discussing its own decisions and those of this Court, commentaries and other pertinent factors, the Court concluded: "We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest'." *Id.* at 1258 (footnote omitted).

Furthermore, education is precious not only in its own right, but also because it provides the tools necessary for exercising other rights which the Supreme Court has recognized as fundamental–voting, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); speech, *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1937); association, *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958); and travel, *Shapiro v. Thompson, supra*, at 629-63.

> [E]ducation underlies the whole substance of the political process and its antecedent to voting in the orders of both time and cause. All political behavior inevitably must reflect the presence or absence and quality of education. A man's understanding of public issues is a function of those communications which are intelligible to him."
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> Coons, Clune and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal.L.Rev. 305, 368 (1969).

The increasing importance of higher education in our society cannot be denied. Financial and social success, career opportunities, personal and institutional association, and status are all positively affected by the extent of one's higher education.

The deprivation of a state provided entitlement such as education must be accompanied by the procedural due process required by the Fourteenth Amendment. As stated in *Bell v. Burson*, 402 U.S. 535, 539 (1971):

> [R]elevant to constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' Sherbert v Verner, 374 US 398, 10 L Ed 2d 965, 83 S Ct 1790 (1963) (disqualification for unemployment compensation); Slochower v Board of Education, 350 US 551, 100 L Ed 692, 76 S Ct 637 (1956) (discharge from public employment); Speiser v Randall, 357 US 513, 2 L Ed 2d 1460, 78 S Ct 1332 (1958) (denial of a tax exemption); Goldberg v Kelly, supra, (withdrawal of welfare benefits). See also Londoner v Denver, 210 US 373, 385-386, 52 L Ed 1103, 1112, 28 S Ct 708 (1908); Goldsmith v Board of Tax Appeals, 270 US 117, 70 L Ed 494, 46 S Ct 215 (1926); Opp Cotton Mills v Administrator, 312 US 126, 85 L Ed 624, 61 S Ct 524 (1941).

While a hearing is not required to satisfy due process under the Fourteenth Amendment "in every conceivable case of governmental impairment of private interest," *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894 (1961), nevertheless, each of the three important interests of property, right to travel, and a statement entitlement present in the instant case require due process in the form of a factual hearing before deprivation. Interests recently deemed by this Court to have been substantial enough to require a due process factual hearing before deprivation

have ranged from automobile licenses, *Bell v. Burson*, 402 U.S. 535; welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970); a putative father's interest in his children, *Stanley v. Illinois*, 405 U.S. 645 (1972); wages, *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969); and household furnishings and clothing, *Fuentes v. Shevin*, 407 U.S. 67 (1972).[42]

The classification of appellees as non-resident out-of-state students deprives appellees of the three important interests of property, interstate travel and a state provided education, each of which require due process of law. Connecticut's utilization of a classification procedure which creates a permanent, irrebuttable presumption of non-residency violates the standards of due process required before the deprivation of these constitutionally protected interests.

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[42] The Fuentes v. Shevin, *supra*, decision recognized the necessity for a due process hearing when an individual is deprived of property and explicitly rejected restricting due process to the deprivation of necessities.

> No doubt, there may be many gradations in the 'importance' or 'necessity' of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest such distinctions. The Fourteenth Amendment speaks of 'property' generally. And, under our free enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to be to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that by its lights are 'necessary.'
> *Fuentes v. Shevin*, 407 U.S. 67, at 89.

CONCLUSION

For the reason that Connecticut's irrebuttable presumption of non-residency violates the Fourteenth Amendment, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX A

OPINION OF THE ATTORNEY GENERAL OF THE STATE OF CONNECTICUT REGARDING NON-RESIDENT TUITION SEPTEMBER 6, 1972

STATE OF CONNECTICUT

ROBERT K. KILLIAN
ATTORNEY GENERAL

ATTORNEY GENERAL'S OFFICE
90 TRINITY STREET
HARTFORD

September 6, 1972

Chancellor Warren G. Hill
Commission for Higher Education
P. O. Box 1320
Hartford, Connecticut 06101

Dear Chancellor Hill:

In your letter you ask a number of questions regarding implementation of the recent Federal Court decision declaring unconstitutional the provisions of Public Act No. 5, Section 126, which provides for permanent out-of-state classification for students attending constituent units of the state system of higher education. Before answering your specific questions, certain background comments might be helpful. The decision of the Court did not prohibit the State from charging an out-of-state differential in tuition and fees. The decision was rather directed against a classification system which placed a student in a permanent category prior to his initial admission. The practical thrust of the Court's opinion is that out-of-state tuition may not be charged to

students who, although originally classified as out-of-state, establish bona fide residence in Connecticut.

This office has filed a notice of appeal to the United States Supreme Court in the tuition case and has also requested that the Court stay its order enjoining the State from classifying students in accordance with the statute. The request for a stay was denied by Mr. Justice Marshall on August 3, 1972. We shall keep you advised of the further course of this litigation. However, pending a final decision in the case, the constituent units should take steps to ensure the provision of procedures whereby a student classified as out-of-state may petition to have his status reviewed.

In reviewing a claim of in-state status, the issue becomes essentially one of domicile. In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning. This general statement, however, is difficult of application. Each individual case must be decided on its own particular facts. In reviewing a claim, relevant criteria include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc.

In answer to your specific questions:

(1) Should the units of the state system of higher education refund all out-of-state tuition and fees collected pursuant to Public Act No. 5, Section 126? If it is your opinion that the tuition should be refunded to those students who were improperly classified, what criteria should be applied in making individual judgments?

A. In the event the United States Supreme Court upholds this decision, the out-of-state differential should be refunded to improperly classified students. The burden is upon the student to demonstrate that at some point in time he became domiciled in Connecticut. In making its judgment in this matter, it would be proper for a constituent unit to consider the above listed and similar criteria.

(2) What criteria with respect to residence should the units utilize in classifying students for the Fall, 1972 and subsequent semesters and terms?

A. Usual criteria.

(3) May the units adopt their own criteria for Fall of 1972? In this connection, would adoption of the following meet the requirements of the Federal Court:

(a) a standard of one year as minimum residence for purposes of levying tuition and fees as in-state students;

(b) a standard of less than one year.

(c) Would it be advisable to utilize provisions proposed in House Bill #5302 as criteria? This Bill was proposed in the most recent session but did not become law. In essence, this Bill provided that an emancipated student could establish Connecticut residence after a period of six months.

A. (a) In the case of *Starns v. Malkerson*, 326 F. Supp. 254 (D. Minn.) (1970) aff'd Mem. 39 U.S.L.W. 3423, (1971), concerning tuition differential at the University of Minnesota, a

minimum of one year domicile was upheld. Accordingly, it is our opinion that a properly enacted minimum domicile of one year for purposes of levying tuition and fees as in-state students would be acceptable.

(b) Yes.

(c) Yes. It should be noted that the substitute for House Bill #5302 was enacted by the Legislature as Public Act 213, and subsequently vetoed.

(4) In connection with the regulations suggested in Paragraph (3) above, is it legally permissible to classify as "out-of-state" one who is a registered voter in Connecticut? We have in mind the situation where college students over eighteen years of age may register to vote in a college town.

A. In our opinion, the mere fact of registering to vote does not in and of itself constitute domicile for tuition purposes. The other criteria should also be considered.

(5) Shall spouses of students classified as residents also be classified as residents even though their place of residence at the time of original application was out-of-state? If their place of residence was in-state at the time of application?

A. Yes, assuming there is no waiting period established.

(6) Shall married students under voting age, who have lived in the state with their spouses for at least six months, be classified as residents?

A. Yes, assuming they meet the criteria for domicile.

(7) Shall students under voting age who have graduated from a high school in Connecticut and have enrolled in a unit of the state system of higher education be classified as residents even though their parents have moved out-of-state prior to the time of their enrollment in college?

A. No, unless they meet other criteria.

(8) Shall members of the armed forces based in the state and the spouse and children of such armed forces members based in the state be classified as residents?

A. Yes, provided they meet other criteria.

(9) Shall honorably discharged members of the armed forces who designate Connecticut as their home of record, even though they have not previously attended school or college in Connecticut, be classified as residents?

A. Yes, provided they meet other criteria.

(10) Would an affidavit stating that the student considers himself or herself a resident of the State of Connecticut be sufficient to establish residency status?

A. The determination must be made on facts—not self-serving declarations. An affidavit would be useful, but there should be supporting data.

With regard to your questions regarding Special Act No. 53 of the 1972 General Assembly, it should be noted that that statute was not mentioned in the tuition litigation before the Federal Court. This legislation thus stands as any other enactment of the legislature, and in interpreting it, ". . . every possible presumption is to be indulged in in favor of the validity of the statute." *Mugler*

v. Kansas, 123 U.S. 623, 661. Accordingly, our answer to your specific question is that in determining residence for the purpose of Special Act No. 53, the criteria set forth in that statute should be used.

Very truly,

Robert K. Killian
Attorney General

By /s/
John G. Hill, Jr.
Assistant Attorney General

JGH:mkv